IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

E. ROBERT SEAVER, CLERK

No. . . . . .

WILLIAM ALMSTEAD,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

CARL A. VERGARI,
District Attorney of
Westchester County,
Court House,
White Plains, New York 10601.
914 761-1144

By: JAMES J. DUGGAN,
Administrative Assistant District Attorney,
Of Counsel.

TABLE OF CONTENTS

	PAGE
Questions Presented	1
Facts	2
POINT I—None of the petitioner's rights was violated by the manner in which the identification procedure was conducted	4
POINT II—There was no request for an adjournment by the petitioner	6
POINT III—The petition should be denied	7
Exhibit A	8
Exhibit A-2	9

CASES CITED

Gilbert v. California, 388 U. S. 263, 18 L. ed. 2d 1178, 87 S. Ct. 1951 4

People v. Prosser, 309 N. Y. 353 7

Stovall v. Denno, 388 U. S. 293, 302, 18 L. ed. 2d 1199, 87 S. Ct. 1967 ..... 1, 4, 5, 6

United States v. Wade, 388 U. S. 218, 18 L. ed. 2d 1149, 87 S. Ct. 1926 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

WILLIAM ALMSTEAD, Petitioner,

against

THE STATE OF NEW YORK, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Pursuant to the Revised Rules of this Court, Rule 24, the respondent submits this brief in opposition to the captioned petition for a writ of certiorari.

Questions Presented

The following questions are presented by this appeal:

1. Was the identification procedure "so unnecessarily suggestive and conducive to irreparable mistaken identification that (the petitioner) was denied due process of law." *Stovall* v. *Denno*, 388 U. S. 293, 302?

2. Was the petitioner's motion to dismiss the indictment by reason of the State's alleged failure speedily to prosecute it properly denied?

Facts

The offices of the Westchester Street Transportation Company, a bus company, were located in 1966 at 450 East Sanford Boulevard in Mount Vernon (25).* The petitioner's father, William Almstead, Sr., had worked for the company as a driver for eight years, but had resigned his position in 1965. Fairly frequently during that time the petitioner had come to the office to leave things for his father or to pick up things (59-60).

Early in the morning of September 21, 1966, Patsy Massella, the Company's Chief Starter or Dispatcher came in to work. At that time he was alone, and both the office door and the safe were closed and intact (69-72). He went about his routine work checking cash receipts and making up a bank deposit slip in preparation for a pickup later on in the day by a Wells-Fargo armored car of the previous two days' cash (71). That represented a total of $9,471.12 in bills and coin, and it was packaged in sixteen canvas bank bags (58, 72). He then relocked the safe and went down to the garage, locking the office door as he left, where from 6:00 A. M. to 7:30 A. M. he got the variously scheduled buses on the road (73-74). He returned to the office and again found the office door and the safe secure. From then until 8:10 A. M. he was alone in the office working on transfers, answering the telephone and generally getting ready for the day's work ahead (74-76).

At 8:10 A. M. Massella left the office and carried some transfers out into the hall. He was seized from behind in such a way as to prevent him from turning, and he was hit on the side of the head by what he believed was a gun. He was shoved back into the office, still unable to see his attacker, and told to open the safe (76-77). When he replied that he couldn't open the safe because he didn't know

---

*Numbers in parentheses refer to minutes of the trial record.

the combination his assailant spun him around and hit him again with the gun, this time in the left temple. For about five seconds at that point he and the robber stood face to face, and finally Massella turned, knelt down and began to open the safe (77-80). The first time he tried the combination it didn't work, and the bandit put the gun against his neck and growled "Stop stalling; this is it; either you open it this time or you're dead" (80-81). He then opened the safe. At the thief's instruction Massella got up and was pushed back out into the hall where the two remained for thirty to forty-five seconds. He then brought Massella back into the office and made him lie face down on the floor. As he lay there he heard the man call to someone else to come in, and at that point Massella heard a new pair of footsteps enter the office (81-82). The second person gagged Massella with a towel and then tied his wrists and ankles together behind him with a length of double strand wire (83-86). Then in three trips apiece the two men carried the sixteen money bags out of the office. When he was satisfied they had left for good Massella was able to roll over and note the time as being 8:18 A. M. on the office clock (86-87). He remained there, helpless, until 8:45 A. M. when he was found by a driver who was coming in from a run (113) and a supervisor who was coming in to work for the day (108-109). Massella identified the petitioner as the first man into the office, the individual who made him open the safe (79).

The petitioner presented a defense which essentially was one of alibi. He introduced an agent of a private investigative agency who stated that he had driven from 450 East Sanford Boulevard in Mount Vernon to 146 Elm Street in Yonkers. He started at 8:18 A. M. and driving at normal speed arrived at the Yonkers address at 8:42 A. M. (187-189), an elapsed time of twenty-four minutes. The petitioner then produced four witnesses, three of whom testified that they had seen him at 146 Elm Street at 8:25 A. M. while the fourth testified she had sent her children

to school at 8:15 A. M. thus locating the time ten minutes after that when one of the first three witnesses had seen the petitioner at 8:25 A. M. (134, 154, 171, 205). The net result of the testimony, therefore, was to place the petitioner at the Elm Street address seventeen minutes before he could have gotten there if he left the bus company, as Massella said he did, at 8:18 A. M.

On rebuttal the People introduced the two investigating detectives who testified that when they interviewed the alibi witnesses the day after the robbery the first three told them that the petitioner had arrived at the Elm Street apartment between 8:45 and 8:50 A.M. and that the woman whose children had contributed to the chronology of his arrival had told them they had gone to school that day at 8:30 A.M. because it was raining and she didn't want them standing out in the rain until the school opened (220-223, 237, 242). In addition Sergeant Colbert testified that he too had driven from the bus company in Mount Vernon to 146 Elm Street in Yonkers and that driving at a normal rate of speed the trip had taken him only fifteen minutes (223-225). That would, of course, have allowed the petitioner to leave Mount Vernon at 8:18 A.M. and still be at Elm Street as early as 8:33 A.M.

POINT I

None of the petitioner's rights was violated by the manner in which the identification procedure was conducted.

Because this identification took place prior to the holdings of this Court in *United States* v. *Wade*, 388 U. S. 218, 18 L. ed. 2d 1149, 87 S. Ct. 1926, and *Gilbert* v. *California*, 388 U. S. 263, 18 L. ed. 2d 1178, 87 S. Ct. 1951, they have no application to the present case, *Stovall* v. *Denno*, 388 U. S. 293, 18 L. ed. 2d 1199, 87 S. Ct. 1967. We must therefore go to *Stovall* in order to determine to what extent, if

any, this identification should be reviewed. There the standard was said to be a determination of whether the confrontation was "so unnecessarily suggestive and conducive to irreparable mistaken identification that (the defendant) was denied due process of law," *Stovall* v. *Denno*, *supra*, 388 U.S. at 302.

The petitioner's brief, rather than informing the Court of the full circumstances surrounding the manner in which Massella identified him, is content to say that the police took Massella to "a location for the purpose of making an identification alone" (Petition, p. 5). That is very like describing Rip Van Winkle as a heavy sleeper. Both assertions may be true, but the critical information is artfully concealed behind the understatement. The "location" to which Massella was taken was a Criminal Part of the New York Supreme Court in New York City where the frenetic pace of the activity is probably better imagined than described. The "alone"-ness the petitioner suggests simply means that he stood "alone" before the bench to be arraigned, one face in a never ending parade of faces.

The hallmark distinction between the lineup procedure, where a group of people are displayed to a witness, and the so-called showup procedure, where the witness views one person, is the concept of *selection*. In the latter situation there is no selection because the witness is called upon to say only either yes or no, this is or is not the man who robbed me. The former is therefore considered more reliable because the odds against an erroneous identification are so much higher. Qualitatively, though, the same high odds attend the viewing of the same group of individuals whether they be lined up five or ten abreast or marched past the witness one at a time, because the same degree of selection must be practiced in either case. It is this latter type of "lineup," then, that was held in this case. Massella was called upon to pick the robber out of a group of men who, in a sense, were paraded by him one at a time

for his inspection. It is submitted there is nothing unfair in such a procedure, and certainly no one will seriously argue that it is so unnecessarily suggestive or conducive to irreparable mistaken identification as to put it within the proscription of the *Storall* rule.

POINT II

There was no request for an adjournment by the petitioner.

The petitioner is arguing under this point that the Court erred in having denied him an adjournment so that he could secure the testimony of two alibi witnesses who were not then available. The respondent most seriously urges upon the Court the view that he never asked for an adjournment. There *was* a motion made to dismiss the indictment pursuant to the New York Code of Criminal Procedure, Sections 8; 688, on the ground that it had not been speedily prosecuted. In the Appellate Division of the New York Supreme Court and again in this petition we find that this motion to dismiss has conveniently become a motion for an adjournment. For the sake of clarity, a copy of the notice of motion and the affidavit in support thereof are reproduced herewith as Exhibit "A".

In order to make this transformation from a motion to dismiss to a motion to adjourn even superficially credible, the petitioner argued in the Appellate Division that:

> "Judge Dickenson treated these papers as a two-pronged motion, both as the motion to dismiss for unreasonable delay in prosecution and as a motion for adjournment on the grounds of the unavailability of alibi witnesses." (Appellant's Brief, p. 5)

This simply cannot be done; the two are mutually exclusive. By definition, in order to avail himself of the benefit of a motion to dismiss by reason of a failure to prosecute

a defendant must be in a position to certify to the Court that no delay has been or can be attributed to him. He must therefore assure the court that he is now and has always been ready and willing to go to trial. This underlying prerequisite is belied altogether if the motion to dismiss is coupled with or treated as a request for an adjournment. In other words, then, in order for a defendant to be qualified to make a motion to dismiss he must first repudiate any suggestion of further adjournment. He may not suffer the prosecutor to secure one, *People* v. *Prosser*, 309 N. Y. 353, and certainly he may not request one.

Granting, therefore, that these two concepts, dismissal and adjournment, cannot exist together, one must be discarded in this situation, and, because the motion was clearly one for dismissal and included citations to the appropriate sections of the Code of Criminal Procedure, it is submitted that any thought that this was either exclusively or partially a motion for an adjournment must be completely rejected.

POINT III

The petition should be denied.

Respectfully submitted,

CARL A. VERGARI,
District Attorney of
Westchester County.

By: JAMES J. DUGGAN,
Administrative Assistant District Attorney,
Of Counsel.

September 10, 1970.

Exhibit A.

COUNTY COURT,

WESTCHESTER COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK,

against

WILLIAM ALMSTEAD,

Defendant.

722-66

PLEASE TAKE NOTICE that the undersigned will move this Court on Tuesday, October 8th 1968, at 10:15 A.M. of said day, or as soon thereafter as counsel can be heard for an order dismissing indictment No. 722-66 against the above entitled defendant on the grounds that said defendant was deprived of his right to a speedy trial pursuant to Sections 8 and 668 of the Code of Criminal Procedure, and pursuant to the relevant sections of the Constitution of the United States of America and the State of New York.

Dated: October 8th, 1968.

Yours, etc.,

JOSEPH S. RAGNO
Attorney for Defendant
Office & P. O. Address
20 East First Street
Mount Vernon, New York

To:

HON. CARL VERGARI
District Attorney
Westchester County

Exhibit A-2.

COUNTY COURT.

WESTCHESTER COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK,

against

WILLIAM ALMSTEAD,

Defendant.

722-66

STATE OF NEW YORK
COUNTY OF WESTCHESTER
CITY OF MOUNT VERNON } ss.:

JOSEPH S. RAGNO, being duly sworn, deposes and says:

1. I am the attorney for William Alstead who was indicted in the Fall of 1966 (No. 722-66) for the crime of Robbery first degree, Assault second degree, Grand Larceny first degree.

2. I appeared for said defendant on his arraignment, interposed a plea of not guilty, and demanded a trial by jury.

3. On or about December 7th 1966, I was served a demand for a bill of particulars pursuant to Section 295-1 of the C.C.P. relating to my client's alibi. On or about December 27th 1966, I served my bill of particulars naming, inter-alia, Robert Almstead and Gene Almstead as persons who could establish defendant's presence elsewhere than at the scene of the crime at the time of its commission.

4. The first notice I had of the trial of this indictment came to me via telephone from Assistant District Attorney Donohue about the middle of September, 1968.

5. I located my client at the Kingsbridge V.A. Hospital from whence he was released in the latter part of September, 1968. I notified Mr. Donohue of these facts, who informed me that the trial of the case was scheduled for October 1st 1968, which trial day was set for October 7th 1968.

6. I saw my client about two weeks ago to review the case with him and learned that neither Robert Almstead nor Gene Almstead were in this jurisdiction, one being in the service in Viet Nam, and the other now residing in California with his father.

7. If the trial had been earlier scheduled these two witnesses would have been here to testify. The danger of the delay in the trial of an indictment is the dimming of witnesses' memories and the unavailability of witnesses, the latter case working irreparable injury to my client herein.

8. A few days ago I notified Mr. Donohue of the unavailability of these witnesses and to the possibility of stipulating that if they testified they would testify that one saw the defendant asleep at home at 7:45 A.M. on September 21st, 1966, and the other saw him asleep at 7:55 A.M. on said day.

9. This professed stipulation was rejected with the consequent damage to my client's defense, all of which would not have occurred if the case had come on for trial within a reasonable time.

10. Upon information and belief many cased junior to the instant case have been tried or schedules for trial.

11. Nothing has transpired to relegate this 1966 case to a late 1968 trial date.

12. The defendant has sought no adjournments or stays in this matter nor has he made motions which have necessitated his inordinate delay.

WHEREFORE your deponent prays that the indictment against the defendant herein be dismissed pursuant to Sections 8 and 668 of the C.C.P. and pursuant to State and Federal Constitutional guarantees to a speedy trial.

/s/ JOSEPH S. RAGNO
Joseph S. Ragno

Sworn to before me this
8th day of October, 1968.